

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13651

185

TRUCK DRIVERS AND HELPERS LOCAL UNION
728 (formerly Local Union 859) OF INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition to Review and Set Aside and on Petition for
Enforcement of an Order of the National Labor Relations Board**

United States Court of Appeals
For the
District of Columbia Circuit

FILED

MAR 29 1957

Joseph W. Stewart

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Decision and Order

UNITED STATES OF AMERICA

**BEFORE THE NATIONAL LABOR RELATIONS
BOARD**

In the Matter of

SALES DRIVERS, HELPERS & BUILDING CON-
STRUCTION DRIVERS, LOCAL UNION 859,
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL

and

ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, INC., GEORGIA BRANCH

Case No.
10-CC-79

Upon a charge duly filed on June 28, 1954, by Associated General Contractors of America, Inc., Georgia Branch, the General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional Director of the Tenth Region, issued a complaint dated July 28, 1954, against Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, hereinafter referred to as Respondent, alleging that it has violated Section 8(b)(4)(A) of the National Labor Relations Act, as amended, by inducing and encouraging employees of various employers to engage in

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strikes or concerted refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any service, with an object of forcing such employers to cease doing business with Campbell Coal Company, hereinafter referred to as Campbell. Copies of the complaint and Notice of Hearing were duly served on the Respondent on or about July 28, 1954. On August 6, 1954, the Respondent filed its answer to the complaint.

Thereafter on September 9, 1954, the parties entered into a stipulation setting forth an agreed statement of facts. The stipulation provided that the parties thereby waive their rights to a hearing, to the taking of testimony before a Trial Examiner of the Board, to issuance of an Intermediate Report and to the filing of exceptions. The Stipulation further provided that, upon such stipulation, the charge, Affidavit of Service of the charge, complaint, Notice of Hearing, Affidavit of Service of the complaint and Notice of Hearing and the Respondent's answer, the Board may make findings of fact, and conclusions of law, and may issue a Decision and Order as if the same facts had been adduced in open hearing before a duly authorized Trial Examiner of the Board.

The aforesaid Stipulation is hereby approved and accepted and made a part of the record in this case. In accordance with Section 102.45 of the National Labor Relations Board Rules and Regulations this proceeding is duly transferred to, and continued before, the Board.

Upon the basis of the aforesaid Stipulation and the entire record in the case, the Board, having duly considered the briefs filed by the parties, makes the following:

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Findings of Fact**I. THE BUSINESS OF THE EMPLOYER**

Campbell Coal Company is a Georgia corporation with its principal office and places of business in that state. It is engaged in the wholesaling and retailing of building materials, including ready-mixed concrete. During the past year Campbell purchased, and caused to be shipped to its establishments at Atlanta, Ga., directly from points outside of the State of Georgia, materials valued in excess of \$1,000,000. During the same period, Campbell sold and shipped directly to points outside the State of Georgia materials valued in excess of \$50,000.

We find that Campbell Coal Company is engaged in commerce within the meaning of Section (2) (6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE RESPONDENT LABOR ORGANIZATION

Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, is a labor organization within the meaning of Section 2(5) of the Act.

III. UNFAIR LABOR PRACTICES

Campbell operates two ready-mix concrete plants in the Atlanta, Ga., area where it employs, among others, truck drivers who drive the trucks by which Campbell delivers its ready-mix to various construction sites in that area. These

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truck drivers enter and leave the ready-mix plants several times during the course of each working day. At the delivery points for the ready-mix, the truck drivers, at the direction of the contractors on the job sites, operate the unloading mechanisms of the truck so as to place the ready-mix at places and in receptacles designated and provided by the contractors. A frequent method of unloading is to pour the mixture into forms so placed that the mixture, when dry, becomes a part of the structure of the project. The drivers spend approximately 25 per cent of their working time at the plant, 25 per cent en route and approximately 50 per cent at the construction sites.

From on or about June 9, 1954, until at least September 8, the date of the Stipulation, the Respondent has been on strike against Campbell because of the discharge of a number of Campbell's ready-mix truck drivers. The Respondent has continuously, at all times material, picketed Campbell's two ready-mix plants. In addition, the Respondent's pickets have followed some of Campbell's trucks from the ready-mix plants to various construction projects in the area where Campbell's trucks make deliveries, although the Respondent has no dispute with any of the contractors on such projects. The pickets carried signs which read:

Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL.

The picketing continued only so long as Campbell's trucks remained on the construction sites and was confined to the immediate area of the truck, or as close as the pickets could get without trespassing on private property. Except by displaying the picket signs, the Respondent's pickets did not communicate with any of the employees working at the construction projects.

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The essential allegation of the complaint is that by picketing the construction projects, the Respondent induced employees of the neutral employers on the projects to cease work as a means of compelling such neutral employers to discontinue their business with Campbell, the primary Employer.

The Respondent defends its picketing of the construction projects on the ground that such picketing allegedly falls within the area of permissible conduct recognized by the Board in *Moore Dry Dock Company*, 92 NLRB 547 and *Stover Steel Service*, 108 NLRB No. 221. We find no merit in the Respondent's argument. Upon consideration of all relevant facts in the case, and for the reasons stated in *Washington Coca-Cola*, 107 NLRB No. 104, affirmed in *Thurston Motor Lines, Inc.*, 110 NLRB No. 122, we find that Respondent's picketing of the construction projects was conducted to force secondary employers located on such projects to cease doing business with Campbell, by inducing and encouraging the employees of said employers to engage in a strike in violation of Section 8(b)(4)(A) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III above, occurring in connection with the operations of Campbell Coal Company have a close, intimate and substantial relation to trade, traffic and commerce along the several states and tend to burden and obstruct commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has violated Section 8(b)(4)(A) of the Act, we shall order it to cease and desist

Decision and Order

therefrom and take certain affirmative action which is necessary to effectuate the policies of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, is a labor organization within the meaning of Section 2(5) of the Act.

2. By engaging in picketing with an object thereof to force or require George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson and Street Company to cease doing business with Campbell Coal Company, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, AFL, and its officers, agents, successors and assigns shall:

Decision and Order

1. Cease and desist from:

(a) Inducing or encouraging employees of George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson and Street Company, or of any other employer to engage in a strike or concerted refusal in the course of their employment to perform services for their employers where an object thereof is to force or require said employers to cease doing business with Campbell Coal Company.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at the business offices of Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, in Atlanta, Ga., copies of the notice attached hereto as Appendix A.¹ Copies of said notice, to be furnished by the Regional Director for the Tenth Region, after being duly signed by official representatives of the Respondent shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of Local Union 859 are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. The Respondent shall also

¹ In the event that this Order is enforced by a Decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Decision and Order

sign copies of the notice which the Regional Director shall submit for posting, the employers willing, at the Atlanta, Ga., premises of the employers listed in Appendix B.

(b) Notify the Regional Director for the Tenth Region, in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., December 30, 1954.

GUY FARMER, *Chairman*,
ABE MURDOCK, *Member*,
PHILIP RAY RODGERS, *Member*,
NATIONAL LABOR RELATIONS BOARD.

(SEAL)

APPENDIX A

NOTICE

To all members of Sales Drivers, Helpers & Building Construction Drivers, Local 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, and to all employees of Campbell Coal Company, pursuant to

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

We will not induce or encourage the employees of George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson and Street Company, or any other employer, to engage in a strike or concerted refusal in the course of their employment to perform any services for their respective employer, where an object thereof is to force or require said Employers to cease doing business with Campbell Coal Company.

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL.

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

George A. Fuller Construction Company
Southeastern Construction Company
The Flagler Company, Inc.
Barge-Thompson Company
Ira H. Hardin Company
Wesley & Company, Inc.
Thompson and Street Company

Stipulation

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS
BOARD

WASHINGTON, D. C.

In the Matter of

SALES DRIVERS, HELPERS & BUILDING CON-
STRUCTION DRIVERS, LOCAL UNION 859, OF
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL

and

ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, INC., GEORGIA BRANCH

Case No.
10-CC-79

It is hereby stipulated and agreed by and between Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL (herein called the Respondent), by and through its attorney, Edwin M. Pearce; Associated General Contractors of America, Inc., Georgia Branch (herein called A.G.C.), by and through its Executive Secretary, Robert H. Strickland; and Frank E. Hamilton, Jr., Counsel for the General Counsel of the National Labor Relations Board, that:

1.

Upon a charge filed by A.G.C. on the 28th day of June, 1954, and served on the Respondent on the 29th day of

Stipulation

June, 1954, receipt of which charge is hereby acknowledged by the Respondent, the General Counsel for the National Labor Relations Board on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director for the Tenth Region, acting pursuant to authority granted in Section 10(b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, and pursuant to Section 102.15 of the Board's Rules and Regulations, issued a complaint and notice of hearing thereon, dated July 28, 1954, against the Respondent. True copies of the aforesaid charge, complaint and notice of hearing thereon were duly served by registered mail upon the Respondent and A.G.C.

2.

The Respondent, in its answer to the complaint herein and by this stipulation, admits the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the aforesaid complaint.

3.

The Respondent concedes the jurisdiction of the Board over the subject matter of this case.

4.

Since on or about June 9, 1954, the Respondent has been on strike against Campbell Coal Company (herein called Campbell) and has continuously, at all times material herein, picketed Campbell's two ready-mix establishments in the Atlanta area. Such strike was called by the Respondent because of the discharge of a number of Campbell's ready-mix truck drivers. The Respondent contends that these drivers were discharged because of their membership in, and activity on behalf of, the Respondent.

Stipulation

5.

Campbell's truck drivers who operate the trucks by which Campbell delivers ready-mix to various contractors, enter and leave Campbell's ready-mix plants a number of times each working day. At the delivery point for the ready-mix the truck drivers, at the direction of the contractor on the job site, operate the unloading mechanisms of the ready-mix truck so as to place the ready-mix at points and in receptacles designated and provided by such contractor. A frequent method of unloading is to pour the mixture into forms which are so placed that when the mixture sets up the concrete becomes a part of the structure or project. The drivers spend approximately 25 per cent of their working time at the plant, approximately 25 per cent of their working time en route to and from the plant and approximately 50 per cent of their working time at the construction site.

6.

Since on or about June 9, 1954, when the Respondent struck Campbell's two ready-mix plants, some of Campbell's trucks have been followed by the Respondent's pickets from the struck ready-mix plants to various construction projects in the Atlanta area where Campbell's drivers were to make delivery of ready-mix to a Campbell customer. At the construction project the Respondent's picket would advise the contractor, or its representative, of the labor dispute with Campbell, and ask the contractor or his representative not to accept the ready-mix from Campbell. In many instances the delivery was then refused, and in those cases the Respondent took no further action. In instances where the contractor elected to accept delivery of ready-mix from Campbell, the Respondent picket that contractor's building project with banners reading:

Stipulation

"Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL."

7.

The aforementioned picketing continued only so long as Campbell's trucks remained on the construction site, and was confined to the immediate area of the trucks, or as close thereto as the picket could get without trespassing on private property.

8.

In some instances some employees working on projects at which such picketing occurred, quit work for the duration of the picketing. The reason assigned by such employees for their refusal to work was the presence of the Respondent's picket sign. The Respondent's pickets did not inform the employees who quit work as aforesaid, or other employees working on the picketed projects, that such picketing was not intended as an appeal to them not to work, nor otherwise inform such employees that they were free to resume work while the picketing was in progress. Other than displaying the picket sign, the Respondent's pickets did not speak to or otherwise communicate with any of the employees working at the construction projects. Except by the display of picket signs, as herein described, the General Counsel does not contend that the Respondent, through its pickets, officers, or otherwise, in any manner threatened, coerced or intimidated employees to quit work, or that any other form of inducement or encouragement of employees, whether by way of union by-laws or rules (written or unwritten), threats, promises, or otherwise, existed.

Stipulation

9.

The contractors at whose construction projects the Respondent picketed as set out in Paragraphs 6, 7 and 8 above, and Paragraph 7 of the complaint herein, are those named in Paragraphs 3, 7 and 8 of the complaint herein.

10.

Because of a current general strike in the Atlanta area against employers in the building and construction industry, work on virtually all building projects in the area has halted. The strike referred to is general in the building trades and has no relation to the matters involved in this proceeding. Because of such work stoppage, the contractors are not ordering and Campbell is not presently delivering ready-mix to such construction projects. However, the Respondent contends that its conduct in picketing at the construction sites of Campbell's customers in the manner herein described, is in all respects legal and proper, and it contends that it has the right, should it so desire, to picket at the job site of any Campbell customer, in the same manner that the picketing was formerly conducted, when the strike in the construction industry is concluded and Campbell resumes making deliveries to such customers. The General Counsel contends that such picketing is violative of Section 8(b)(4)(A) of the Act, and the Respondent contends that it is not.

11.

This stipulation, together with the charge, affidavit of service of the charge, complaint, notice of hearing thereon, affidavit of service of complaint and notice of hearing thereon, and the Respondent's answer, shall constitute the entire record herein and shall be filed with the Board.

Stipulation

12.

The parties hereto expressly waive hearing, intermediate report of trial examiner, the filing of exceptions and oral argument before the Board, and all briefs in this matter will be submitted to the Board thirty (30) days from the date hereof.

13.

This stipulation is subject to the approval of the National Labor Relations Board. Upon the Board's approval of this stipulation and on receipt of the briefs provided for hereinabove, the Board may decide the case, make findings of fact and conclusions of law and issue an appropriate order as though after hearing, intermediate report, exceptions and oral argument before the Board.

14.

This stipulation contains the entire agreement of the parties, there being no agreement of any kind, verbal or otherwise, which varies, alters or adds to the stipulation.

IN WITNESS WHEREOF the undersigned hereunto set our hands on the dates and at the places written opposite our respective names.

SALES DRIVERS, HELPERS & BUILD-
ING CONSTRUCTION DRIVERS, LO-
CAL UNION 859, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL.

Dated Aug. 31, 1954,
at Atlanta, Ga.

By EDWIN M. PEARCE,
Attorney.

Stipulation

Dated Sept. 8, 1954,
at Atlanta, Ga.

Dated Sept. 3, 1954,
at Atlanta, Ga.

ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, INC., GEORGIA
BRANCH.

By ROBERT M. STRICKLAND,
Executive Secretary.

FRANK E. HAMILTON, JR.,
*Counsel for the General
Counsel,*
National Labor Relations
Board, Tenth Region, 528
Peachtree-Seventh Building,
Atlanta, Ga.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALES DRIVERS, HELPERS & BUILDING CON-
STRUCTION DRIVERS, LOCAL UNION 859, OF
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL, *Petitioner*

No.
12605

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW AND ON CROSS-PETITION FOR
ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD *

Decided December 8, 1955

Mr. Herbert S. Thatcher, with whom *Mr. Drexel A. Sprecher* was on the brief, for petitioner.

Mr. Norton J. Come. Attorney, National Labor Relations Board, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of Court, with whom *Mr. Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, was on the brief, for respondent.

* 10-CC-79; 110 NLRB 2192.

Opinion

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

FAHY. *Circuit Judge*: On findings of fact based upon a stipulation among the appellant Union, the General Counsel of the National Labor Relations Board, and the Associated General Contractors of America, Inc., Georgia Branch, the Board entered an order against the Union requiring it to cease and desist conduct found to violate section 8(b) (4)

(A) of the Taft-Hartley Act, the so-called secondary boycott provision.¹ The Union petitions us to set aside the order and the Board petitions us to enforce it.

The case involves picketing at sites shared by the struck employer and neutral employers. The pertinent findings of fact contained in the Board's decision are in substance as follows: Campbell Coal Company is engaged in the sale of building materials including ready mixed concrete. It operates two ready-mix concrete plants in Atlanta, where it employs, among others, men who drive trucks by which Campbell delivers its ready-mix to construction sites. At the delivery points the truck drivers at the direction of the

¹ This section provides:

“(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

“(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. * * *” 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (4) (A) (1952).

Opinion

contractors on those sites operate the unloading mechanism of the truck so as to place the ready-mix at places and in receptacles designated and provided by the contractors. Frequently the unloading is accomplished by pouring the mixture into forms so placed that when dry the mixture becomes part of the structure on the project. The drivers spend approximately 25 per cent of their working time at their employer's plants, 25 per cent en route, and 50 per cent at construction sites.

The Union initiated a strike against Campbell because of the discharge of a number of the truck drivers. It picketed the two ready-mix plants. In addition the pickets followed some of the trucks from the plants to various construction projects where the trucks made deliveries, although the Union had no dispute with any of the contractors on such projects. It is this latter picketing which the Board found to be illegal. The pickets carried signs which read as follows:

"Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL."

The picketing continued so long as Campbell's trucks remained on the construction site and was confined to the immediate area of the trucks or as close as the pickets could get without trespassing on private property. Except for displaying the picket signs. The Union's pickets did not communicate with any employees working at the projects.

On these findings² the Board reached the conclusion

² Some additional facts are contained in the stipulation but are not the subject of findings by the Board. No contention in this court is made by the Board upon the basis of these facts, although

Opinion

that section 8(b) (4) (A) was violated because the picketing was conducted "to force secondary employers located on such [construction] projects to cease doing business with Campbell, by inducing and encouraging the employees of said employers to engage in a strike * * *"

In so ruling the Board said it relied upon the "reasons stated in *Washington Coca-Cola*, 107 NLRB No. 104 [p. 299], affirmed in *Thurston Motor Lines, Inc.*, 110 NLRB No. 122 [p. 748] * * * " It considered without merit the Union's defense that its picketing of the construction projects was within the area of permissible conduct recognized by the Board in *Moore Dry Dock Company*, 92 N.L.R.B. 547. In that case the Board laid down certain conditions which a union must meet in order for its picketing to be lawful where the site picketed is shared by the primary employer and neutral employers. These conditions are that the picketing disclose clearly that the dispute is with the primary employer only, that the picketing is

some of them are enumerated in its brief. These are that at each construction site the Union agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused the Union took no further action, but if accepted the Union agents picketed the immediate area of the trucks with the signs already described. The picketing continued while Campbell's trucks remained on the construction site. In some instances employees of the contractors working on the construction projects quit work for the duration of the picketing, assigning as the reason therefor the presence of the picket signs. The Union agents did not inform employees who quit or other employees on the projects that the picketing was not intended as an appeal to them not to work, but pickets did not speak to or communicate with any employees on the projects other than by displaying the picket signs, or in any manner threaten, coerce, or intimidate the employees to quit work or offer any other form of inducement or encouragement so to do.

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limited to times when the dispute situs is on the neutral employer's premises, that the primary employer is engaged in its normal business at the common situs when the picketing takes place, and that the picketing is confined to areas reasonably close to the situs of the dispute. The Union here contends that it has met these conditions but that the Board has added another and absolute prerequisite that no situs for effective picketing other than the common one be available. While in *Moore Dry Dock* it was a fact that no such separate situs was available, the Board decision did not specify this as one of the conditions for lawful picketing at a common situs. We agree with the Union that in the case at bar the Board has added this condition and has applied a rigid rule that when another such separate situs is available picketing at a common situs is prohibited. This is borne out by the findings relied upon by the Board, above set forth, by its brief in support of its decision, and by the reasoning of the decision itself. As to the latter, the *Thurston* case is expressly relied upon. There the Board held that picketing at a common situs was unlawful "when the employer has a primary place of business in the locality which can be picketed by the labor organization with which the employer has a dispute." 110 N.L.R.B. at 754. Since there was such a separate situs it was concluded that the picketing at the situs which was common to the struck employer and the secondary employer was not primarily, but was "an attempt to induce and encourage the employees of various secondary employers to engage in a strike or a concerted refusal in the course of their employment to handle or work on Thurston's goods or perform services involving Thurston's goods, an object thereof being to require such secondary employers to cease doing business with Thurston."³ *Ibid.*

³ Although these statements are taken from the trial exam-

Opinion

In *Washington Coca-Cola, supra*, decided before *Thurston*, and now also relied upon, the Board answered a union's contention that certain picketing was protected by the *Moore Dry Dock* rule by holding the rule inapplicable whenever the struck employer has a permanent place of business at which picketing can be effectively carried on.

Finally, we consider the Board's brief. It states:

"Accordingly, the question is not * * * whether 'the dispute reaches to the area which is being picketed,' but whether Campbell, the primary employer, had separate premises in the area which provided the Union with a fixed and adequate base for carrying on its primary activity. The record shows that, like the company in *Coca-Cola, supra*, it did have such premises. * * * In these circumstances the Board's common situs rules are inapplicable, there being no excuse, other than the impermissible one of increasing the effectiveness of the picketing, for allowing the Union to extend it to the construction projects and thereby invoke neutral employers in its dispute with Campbell."

iner's findings of fact, they must be regarded as proper expressions of the rule upon which the Board depends in the instant case. In the first place, the Board in *Thurston* adopted these findings. And in the second place, any other conclusion would rob of meaning the Board's reliance in the instant case upon "the reasons * * * affirmed in *Thurston Motor Lines, Inc. * * **" since the Board gave no independent expression of reasons for the *Thurston* decision. It is true that the examiner assigned an alternative reason in *Thurston*, namely, that another *Moore Dry Dock* requirement was absent inasmuch as the picketing did not clearly disclose that the dispute was with the primary employer only. But the Board could not have intended to refer to this reason as applicable to the instant case, since here the picket signs were clear and there were no attempts by those picketing to induce employees of neutral employers not to cross the picket line, as there were in *Thurston*. Moreover, the Board's brief, discussed in the text *infra*, demonstrates beyond doubt that the rule relied upon is the one above outlined.

Opinion

Affirmance by this court of the *Coca-Cola* order, *sub nom. Brewery and Beverage Drivers and Workers Local Union No. 67 v. NLRB*, — U.S. App. D.C. —, 220 F. 2d 380, did not constitute approval of the rule now advanced by the Board, but must be construed only as agreement with the conclusion the Board there reached, which rested in considerable part upon additional findings. Here, in contrast, the decision rests solely upon the fact that Campbell had other places of business, not common with a neutral employer, which could be and were being picketed.⁴ Yet Campbell's employees worked at these places only about 25 per cent of their time and spent 50 per cent with the trucks at places where Campbell did business coincidentally with neutral employers. Section 8(b) (4) (A) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another, even where the activity could be carried on at a place where the primary employer alone does business. The existence of a common site, of such incidental effect, and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive.⁵ The presence of these factors does not war-

⁴ These were not the only factors considered by the Board in its decision recently upheld in *NLRB v. Associated Musicians of Greater New York, Local 802*, No. 23550, 2d Cir., Nov. 3, 1955. In that case requests were made by Union representatives that the secondary employers cease doing business with the primary employers. This was true in the present case, but was not relied upon by the Board. See note 2 *supra*. There are also other factual distinctions between the two cases.

⁵ In addition to *Moore Dry Dock*, *supra*, see *Schultz Refrigerated Service*, 87 N.L.R.B. 502; *Oil Workers International Union (The Pure Oil Co.)*, 84 N.L.R.B. 315; *NLRB v. Service Trade Chauffeurs*,

Opinion

rant a failure to consider other facts which are relevant and perhaps countervailing. See *NLRB v. General Drivers, Warehousemen and Helpers, Local 968*, 225 F. 2d at 209-210. No rigid rule which would make these few factors conclusive is contained in or deducible from the statute. To read it into the statute by implication would unduly invade the application of section 13⁶ which preserves the right to strike "except as specifically provided" in other provisions of the Act. It is not specifically provided that picketing at a common site, with an incidental effect upon employees of a neutral employer, is unlawful in every case where picketing could also be conducted against the primary employer at another of its places of business.

This view has been set forth at length in *NLRB v. General Drivers, Warehousemen and Helpers, Local 968*, 225 F. 2d 205 (5th Cir.). There the labor dispute involved four warehouse employees who occasionally made deliveries to construction sites where the remainder of the employer's work force was engaged. Employees of neutral employers were also working at these sites, but not at the primary employer's warehouse. Nevertheless, these common sites were picketed along with the warehouse, regardless of whether any of the four employees made deliveries to the construction projects. The picket signs together with pamphlets distributed by the pickets showed that the strike was against only the primary and no other employer, and that the picket line should be considered as directed only towards those locations within the projects where primary employees were working. The court held the Board erred

191 F. 2d 65 (2d Cir.); *NLRB v. Local Union No. 55*, 218 F. 2d 226 (10th Cir.).

⁶ 61 Stat. 151 (1947), 29 U.S.C. § 163 (1952).

Opinion

in concluding that the Union was in violation of section 8(b) (4) (A) merely upon the basis of findings that "the drivers and warehousemen involved were employed 'not at the construction projects but at the Otis Massey [the primary employer's] warehouse,' so that the warehouse location was the sole 'situs of the Union's dispute,' and the place where it could 'adequately publicize' its private controversy with the primary employer without disrupting work of the *other* neutral employers." *Id.* at 208. Although such a finding as to situs, arrived at in part by applying the same "adequate publicity" rule here proposed, brought the case within the *Moore Dry Dock* criterion barring picketing at a common situs which is not the situs of the dispute, the court said that the approval which had been given by the courts to the standards set forth in *Moore Dry Dock* for lawful picketing at a common site.

"* * * was necessarily based upon substantial evidence that the unlawful objective denounced by the statute actually existed, rather than upon the inferentially suggested theory that this ultimate and controlling statutory inquiry may be effectually supplanted merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' publicized with impunity under the Act, and thereby inferring from such findings, as here, that the unlawful objective exists. Indeed, such a theory would, we think, elevate the Board formulated 'criteria' by judicial fiat to a vantage point from which it could, in effect, circumvent the statute, for in this type instance it would substitute Board inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements that it is 'the objective of the union's secondary activities * * * and

Opinion

not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision." *International Brotherhood of Electrical Workers Local 501, v. N.L.B.R.*, 341 U.S. 694, 704 * * *." 225 F. 2d at 209-210.

We agree with this analysis. In this case the Board does not even press the contention that the existence of a separate situs of the primary employer causes the *Moore Dry Dock* standards to bar picketing at a common situs. Rather it seems to assert that these standards need not be considered if effective picketing can be conducted at a situs not common. Nevertheless, this difference of approach and whatever factual differences exist between *Brewery and Beverage Drivers* and this case do not render the Fifth Circuit's reasoning any less pertinent. A violation of section 8(b) (4) (A) is not to be found by a rule of decision based upon findings which are inadequate to support the conclusion reached.

Since the decision of the Board, as shown by its findings and reasoning, turns upon the fact of concerted activity at a common situs where one not common was available, we will set aside the order, notwithstanding the picketing had incidental effect upon employees of neutral employers, but will remand the case to the Board for its further consideration, if desired. Otherwise our decision would constitute an approval of a rigid rule which the language of the statute does not support.

It is so ordered.

116 NLRB No. 124

D-35
Atlanta, Ga.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

SALES DRIVERS, HELPERS & BUILDING CON-
STRUCTION DRIVERS LOCAL UNION 859 OF
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO (Camp-
bell Coal Company)

and

ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, INC., GEORGIA BRANCH

Case No.
10-CC-79

SUPPLEMENTAL DECISION AND ORDER

On December 30, 1954, the Board issued a Decision and Order in this case.¹ It found that the Respondent had violated Section 8(b) (4) (A) of the Act by picketing the work places of certain secondary employers to induce or encourage employees of said employers to engage in a strike with an object thereof to force employers to cease doing business with Campbell Coal Company. To remedy the violation found the Board ordered the Respondent to cease and desist from the conduct found to be unlawful and to take certain affirmative action.

¹ 110 NLRB 2192

Supplemental Decision

In its Decision the Board rejected the Respondent's contention that its picketing of work places occupied by secondary employers fell within the area of permissible conduct recognized by the Board in *Moore Dry Dock Company*, 92 NLRB 547, and *Stover Steel Service*, 108 NLRB 1575. In rejecting this contention and in finding the violation the Board applied its reasoning, as expressed in *Washington Coca-Cola Bottling Company*, 107 NLRB 299, that picketing at a common situs occupied by both the primary employer and secondary employers is unlawful where the employer, as in the instant case, has a place of business in the locality occupied by it alone which can be adequately picketed.

The case was considered by the United States Court of Appeals for the District of Columbia² upon the Respondent's petition for review and for the Board's cross-petition for enforcement of its Order. The Court issued its opinion on December 8, 1955, setting aside the Board's Order and remanding "the case to the Board for its further consideration, if desired." In its opinion the Court disagreed with the Board's application of the *Washington Coca Cola* rationale and stated that the "existence of a common situs, of such incidental effect, and of another place which can be picketed are factors to be considered in determining whether or not the Section [Section 8 (b) (4) (A)] has been violated, but alone are not conclusive."

The Court set aside the Order of the Board solely on the ground that the Board's decision "turns upon the fact of concerted activity at a common situs where one not common is available." This the Court believed to be a rigid rule which it would be approving were it to enforce the Board's Order. In its decision, however, the Court recog-

² 229 F. 2d 514, Cert. denied 351, U. S. 972.

Supplemental Decision

nized that there was additional evidence in this record to support a finding that the Respondent Union had violated Section 8(b) (4) (A). Such evidence was not relied upon by the Board and was therefore not considered by the Court in the enforcement proceeding. In view of the Court's decision, the Board has carefully reconsidered the entire record in this case to determine upon all the evidence whether the picketing activities of the Respondent are in violation of the Act.

As heretofore found, the Campbell Coal Company operated two ready-mix concrete plants in the Atlanta, Georgia, area and employed truckdrivers for the purpose of transporting the ready-mix to various construction projects in that area. The truckdrivers entered and left the ready-mix plants several times during the course of each day, spending approximately 25 percent of their working time at the plants, 25 percent en route and 50 percent at the construction sites. At the construction sites the truckdrivers operate the loading mechanisms of the trucks so as to deposit the ready-mix at places and in receptacles designated and provided by the contractors. A frequent method of unloading is to pour the mixture into forms so placed that the mixture, when dried, becomes a part of the structure of the project.

In June 1954 the Union called a strike against Campbell and picketed its two ready-mix plants. In addition the pickets followed Campbell's trucks to the construction projects where they made deliveries. The pickets carried signs reading:

Employees of Campbell Coal Company on strike in protest of discharge against Union employees. Sales Drivers, Helpers & Building Construction Drivers, Local 859, AFL-CIO.

Supplemental Decision

The picketing continued only so long as Campbell trucks remained at the construction projects and was confined to the immediate area of the trucks. Except by displaying the picket signs, the pickets did not communicate with any of the employees at the project. At each construction site the Respondent's agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused the Respondent took no further action, but if accepted the Respondent's agents picketed the trucks as described above. Further, in some instances employees of the neutral contractors refused to work for the duration of the picketing, assigning as their reason the presence of the picket signs. The Respondent's agents made no effort to inform these employees that the picketing was not intended as an appeal to them not to work.

The Respondent contends that its picketing was limited to the employees of Campbell Coal and was not intended to induce a concerted refusal to work by employees of the neutral contractors. The Respondent's position is, in our opinion, directly refuted by the evidence set forth above. Unable to cause a cessation of business between certain neutral contractors and the primary employer by direct appeals to the former, the Respondent sought to accomplish that objective through a picket line appeal to employees of the secondary employers. Only those employers who refused to accede to the Respondent's demands that they cease doing business with Campbell Coal were picketed. When employees of these employers ceased working as a direct result of the picketing the picket line had accomplished the Respondent's previously revealed objective of putting pressure on neutral employers to force them to cease doing business with the primary employer. No attempt was made by the Respondent to inform striking employees that the

Supplemental Decision

picket line was aimed at Campbell Coal and not at the employees of neutral contractors. As the Court of Appeals for the District of Columbia indicated in its decision, evidence of this nature has been held sufficient to establish the unlawful object of picketing under Section 8 (b) (4). *N.L.R.B. v. Associated Musicians of Greater New York, Local 802*, 226 F. 2d 900 (C. A. 2).

A consideration of all these elements in the record, including, but not limited to, the fact that the Respondent could have effectively picketed Campbell Coal at its own business premises in the area, persuades us that the Respondent had violated Section 8 (b) (4) within the meaning of the decision of the Court of Appeals for the District of Columbia, remanding the case to the Board for further consideration, if desired.

Accordingly, upon the basis of this Supplemental Decision the National Labor Relations Board hereby respectfully requests the United States Court of Appeals for the District of Columbia to enforce the following Order.

ORDER

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, and its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Inducing or encouraging employees of George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson

Supplemental Decision

Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson and Street Company, or of any other employer to engage in a strike or concerted refusal in the course of their employment to perform services for their employers where an object thereof is to force or require said employers to cease doing business with Campbell Coal Company.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at the business offices of Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, in Atlanta, Georgia, copies of the notice attached hereto as Appendix A.³ Copies of said notice, to be furnished by the Regional Director for the Tenth Region, after being duly signed by official representatives of the Respondent shall be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of Local Union 859 are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material. The Respondent shall also sign copies of the notice which the Regional Director shall submit for posting, the employers willing, at the Atlanta, Georgia, premises of the employers listed in Appendix B.

³ In the event that this Order is enforced by a Decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Supplemental Decision

(b) Notify the Regional Director for the Tenth Region, in writing within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated Sept. 7, 1956, Washington, D. C.,

BOYD LEEDOM, *Chairman*
ABE MURDOCK, *Member*
PHILIP RAY ROGERS, *Member*
STEPHEN S. BEAN, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX A

NOTICE

TO ALL MEMBERS OF SALES DRIVERS, HELPERS
& BUILDING CONSTRUCTION DRIVERS, LOCAL
859, OF INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL, AND TO ALL
EMPLOYEES OF CAMPELL COAL COMPANY

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

WE WILL NOT induce or encourage the employees of GEORGE A. FULLER CONSTRUCTION COMPANY, SOUTHEASTERN CONSTRUCTION COMPANY, THE FLAGLER COMPANY, INC., BARGE-THOMPSON COMPANY, IRA H. HARDIN COMPANY, WESLEY & COMPANY, INC., AND THOMPSON AND STREET COMPANY, or any other employer, to engage in a strike or concerted refusal in the course of their employment to perform any services for their respective employer, where an object thereof is to force or require said Employers to cease doing business with Campbell Coal Company.

APPENDIX A

SALES DRIVERS, HELPERS & BUILD-
ING CONSTRUCTION DRIVERS,
LOCAL UNION 859, OF INTERNA-
TIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WARE-
HOUSEMEN, & HELPERS OF
AMERICA, AFL.

Dated By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof,
and must not be altered, defaced, or covered by any other material.

APPENDIX B

George A. Fuller Construction Company
Southeastern Construction Company
The Flagler Company, Inc.
Barge-Thompson Company
Ira H. Hardin Company
Wesley & Company, Inc.
Thompson and Street Company

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS
BOARD

SALES DRIVERS, HELPERS & BUILDING CON-
STRUCTION DRIVERS, LOCAL UNION 859, OF
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO (Camp-
bell Coal Company)

and

ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, INC., GEORGIA BRANCH

Case No.
10-CC-79

ORDER GRANTING MOTION

On September 7, 1956, the Board issued a Supplemental Decision and Order¹ in the above-entitled proceeding. Thereafter, on October 31, 1956, counsel for the General Counsel filed a Motion to Amend Supplemental Decision and Order by naming Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO as the Respondent in lieu of Sales Drivers, Helpers & Building Construction Drivers Local Union 859 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO. Attached to the said motion was a Stipulation of the parties agreeing to such amendment. The Board having duly considered the matter,

¹ 116 NLRB No. 124.

Order Granting Motion

IT IS HEREBY ORDERED that the Motion to Amend Supplemental Decision and Order be, and it hereby is, granted.

Dated, Washington, D. C., November 15, 1956.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUCK DRIVERS AND HELPERS, LOCAL UNION
728 (formerly Local Union 859) OF
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO

Petitioner,

No. 13,651

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PREHEARING CONFERENCE STIPULATION

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of the Court, do hereby stipulate and agree as follows with respect to the issues, the dates for the filing of the briefs and joint appendix, and the contents of the joint appendix:

I. STATEMENT OF THE ISSUE

Whether the Board properly concluded that, in the circumstances of this case, the union's picketing at various construction projects violated Section 8(b)(4)(A) of the National Labor Relations Act.

II. THE CONTENTS OF THE RECORD
AND THE JOINT APPENDIX

1. The record in No. 12,605, *Sales Drivers, Helpers and Building Construction Drivers, Local Union 859 v. N.L.R.B.*

Stipulation

(C.A.D.C.), shall be incorporated into and made a part of the record in the instant proceeding.

2. The portions of the record to be printed as a joint appendix shall consist of:

(a) The decision and order of the Board in *Sales Drivers, etc. and Associated General Contractors of America, Inc., Georgia Branch*, Case No. 10-CC-79, dated December 30, 1954.

(b) The stipulation in Case No. 10-CC-79 entered into about September 9, 1954, between the union, the charging party, and counsel for the General Counsel of the Board.

(c) The opinion of the Court of Appeals for the District of Columbia Circuit in No. 12,605, *Sales Drivers, Helpers and Building Construction Drivers Local Union 859 v. N.L.R.B.*, dated December 8, 1955.

(d) The supplemental decision and order of the Board in *Sales Drivers, Helpers and Building Construction Drivers, Local Union 859, et al.*, Case No. 10-CC-79, dated September 7, 1956.

(e) Order of the Board in Case No. 10-CC-79 granting motion to amend supplemental decision and order, dated November 15, 1956.

III. DATES FOR FILING OF BRIEFS
AND JOINT APPENDIX

Petitioner's opening brief and the joint appendix shall be filed on or before March 29, 1957.

Respondent's brief shall be filed on or before April 30, 1957.

Petitioner's reply brief, if any, shall be filed on or before May 20, 1957.

Stipulation

Dated at Washington, D. C. this 25th day of February,
1957.

HERBERT S. THATCHER,
Counsel for Petitioner.
Counsel for Respondent

STEPHEN LEONARD,
Associate General Counsel
National Labor Relations Board

*United States Court of Appeals
For the District of Columbia Circuit*

JANUARY TERM, 1957.

TRUCK DRIVERS AND HELPERS LOCAL UNION
728 (FORMERLY LOCAL UNION 859) OF IN-
TERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFERS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 13,651

FILED, MAR. 1, 1957

JOSEPH W. STEWART, *Clerk.*
Before: Burger, Circuit Judge.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation dated February 25, 1957, and the stipulation having been considered, the stipulation of the parties is hereby approved, and it is

ORDERED that the parties proceed according to the stipulation and that this order and the stipulation dated February 25, 1957, be printed in the joint appendix.

Dated: March 1, 1957.

7/21
P-DAB-7
9-10-57
(2)

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13651

**TRUCK DRIVERS AND HELPERS LOCAL UNION 728
(FORMERLY LOCAL UNION 859) OF INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA, AFL-CIO,
PETITIONER**

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION TO REVIEW AND ON PETITION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
NORTON J. COME,
WILLIAM J. AVRUTIS,
Attorneys,
National Labor Relations Board.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

APR 30 1957

Joseph W. Stewart

CLERK

STATEMENT OF QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Union's activity, at various construction projects where employees of the employer involved in the primary labor dispute came into contact with employees of neutral employers, induced the neutral employees to strike for an object of forcing their employers to cease doing business with the primary employer, in violation of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended.

(1)

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AUTHORITIES CITED

Cases:

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13651

TRUCK DRIVERS AND HELPERS LOCAL UNION 728
(FORMERLY LOCAL UNION 859) OF INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION TO REVIEW AND ON PETITION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

JURISDICTIONAL STATEMENT

This case is before the Court upon the petition of the Union¹ to review and set aside, and upon petition of the Board to enforce, an order (J. A. 32a-34a)² issued against the Union, pursuant to supplemental proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C.,

¹ Truck Drivers and Helpers Local Union 728 (formerly Local Union 859) of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO. The board proceeding originally involved Local Union 859, but that union was later dissolved and its membership and jurisdiction were taken over by petitioner Local Union 728. By stipulation of the parties, the Board accordingly substituted Local Union 728 for Local Union 859 (J. A. 38a-39a).

² "J. A." refers to the joint appendix.

Secs. 151 *et seq.*, hereafter called the Act).³ An earlier Board order with respect to the same conduct was set aside by this Court in *Sales Drivers, etc. Local Union 859 v. N. L. R. B.*, No. 12605, 97 U. S. App. D. C. 173, 229 F. 2d 514, certiorari denied, 351 U. S. 972, and the case was remanded "to the Board for its further consideration, if desired" (J. A. 27a).⁴ The Board's original Decision and Order (J. A. 1a-8a) are reported at 110 N. L. R. B. 2192, and its Supplemental Decision and Order (J. A. 28a-34a) are reported at 116 N. L. R. B. No. 124. This Court has jurisdiction under Section 10 (e) and (f) of the Act.

STATEMENT OF THE CASE

I. The prior proceeding

In its prior opinion herein, this Court summarized the pertinent findings of fact contained in the Board's original decision as follows (J. A. 19a-20a):

Campbell Coal Company is engaged in the sale of building materials including ready-mixed concrete. It operates two ready-mix concrete plants in Atlanta, where it employs, among others, men who drive trucks by which Campbell delivers its ready-mix to construction sites. At the delivery points the truck drivers at the direction of the contractors on those sites operate the unloading mechanism of the truck so as to place the ready-mix at places and in receptacles designated and provided by the contractors. Frequently the unloading is

³ The relevant portions of the Act are set forth at the end of this brief, pp. 15-16, *infra*.

⁴ This Court's former decision is printed in the Joint Appendix, at 18a-27a.

accomplished by pouring the mixture into forms so placed that when dry the mixture becomes part of the structure on the project. The drivers spend approximately 25 per cent of their working time at their employer's plants, 25 per cent en route, and 50 per cent at construction sites.

[In June 1954,] the Union initiated a strike against Campbell because of the discharge of a number of the truck drivers. It picketed the two ready-mix plants. In addition the pickets followed some of the trucks from the plants to various construction projects where the trucks made deliveries, although the Union had no dispute with any of the contractors on such projects. It is this latter picketing which the Board found to be illegal. The pickets carried signs which read as follows:

“Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL.”

The picketing continued so long as Campbell's trucks remained on the construction site and was confined to the immediate area of the trucks or as close as the pickets could get without trespassing on private property. Except for displaying the picket signs, the Union's pickets did not communicate with any employees working at the projects.

On these facts, the Board concluded that the picketing at the construction projects was violative of Section 8 (b) (4) (A) of the Act. It applied the principle, first enunciated in *Washington Coca-Cola Bottling Works*, 107 N. L. R. B. 299, that, where the

separate premises of the primary employer afford the union an adequate opportunity for picketing, a violation of Section 8 (b) (4) (A) is automatically established when the picket line is extended to premises where the primary employees work with neutral employees (J. A. 29a, 5a). This Court rejected this conclusion, on the ground that no such "rigid rule * * * is contained in or deductible from the statute" (J. A. 25a). In the Court's view, the "existence of a common site," the fact that picketing there would necessarily affect "employees of another," and the existence "of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive" (J. A. 24a).

However, the Court noted that the record before the Board, which consisted of a stipulation by the parties (J. A. 11a—17a), contained "some additional facts" which were "not the subject of findings by the Board" (J. A. 20a, fn. 2). The Court added (*Ibid.*):

These are that at each construction site the Union agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused the Union took no further action, but if accepted the Union agents picketed the immediate area of the trucks with the signs already described. The picketing continued while Campbell's trucks remained on the construction site. In some instances employees of the contractors working on the construction projects quit work for the

duration of the picketing, assigning as the reason therefor the presence of the picket signs. The Union agents did not inform employees who quit or other employees on the projects that the picketing was not intended as an appeal to them not to work, but pickets did not speak to or communicate with any employees on the projects other than by displaying the picket signs, or in any manner threaten, coerce, or intimidate the employees to quit work or offer any other form of inducement or encouragement so to do.

Accordingly, the Court remanded "the case to the Board for its further consideration, if desired" (J. A. 27a).

II. The supplemental proceeding

The Board thereafter reconsidered the original record in the case "to determine upon all the evidence whether the picketing activities of the [Union] are in violation of the Act" (J. A. 30a). Upon the entire record, including the additional facts cited by the Court (pp. 4-5, *supra*), the Board concluded that the Union's picketing at the construction projects was aimed at the employees of the neutral employers, in violation of Section 8 (b) (4) (A) of the Act. Thus, the Board took into account, not only the fact that the Union could have effectively picketed Campbell Coal at its own plants, but also the further circumstances that: (J. A. 31a-32a):

Unable to cause a cessation of business between certain neutral contractors and the primary employer by direct appeals to the former, the Respondent sought to accomplish that objective

through a picket line appeal to employees of the secondary employers. Only those employers who refused to accede to the Respondent's demands that they cease doing business with Campbell Coal were picketed. When employees of these employers ceased working as a direct result of the picketing the picket line had accomplished the Respondent's previously revealed objective of putting pressure on neutral employers to force them to cease doing business with the primary employer. No attempt was made by the Respondent to inform striking employees that the picket line was aimed at Campbell Coal and not at the employees of neutral contractors.

The Board entered an order requiring the Union to cease and desist from the unfair labor practices found, and to post appropriate notices (J. A. 32a-34a).

SUMMARY OF ARGUMENT

The Union's activity at the construction projects exhibits both the means and the objective proscribed by Section 8 (b) (4) (A) of the Act. Thus, the picketing at the projects induced secondary employees to strike, for the record shows that employees of at least some of the neutral contractors refused to work for the duration of the picketing, specifically attributing their action to the presence of the pickets. Moreover, the circumstance that the project was picketed only if the neutral contractor first refused the Union's request to decline delivery of Campbell's concrete reveals that an object of this inducement of secondary employees was to force their employers to cease using Campbell's products.

There is no merit to the Union's contention that the evidence does not show an intent to involve neutrals directly, but merely a legitimate effort to picket the primary employer at the work places of his employees. The Union's attempt to explain its specific requests to the contractors not to handle Campbell's product as an act of "courtesy" or the discharge of a "moral obligation" is not supported by the record. Indeed, it is significant that here, unlike *N. L. R. B. v. General Drivers, etc. Local 968*, 225 F. 2d 205 (C. A. 5), certiorari denied, 350 U. S. 914, the union did not make plain to the neutral employers that its dispute was only with the primary employer, nor did it attempt to inform the secondary employees, when they began to walk off the job, that the picketing was not aimed at them.

In addition to the evidence showing the Union unequivocally demanded that the contractors discontinue using Campbell's products, and failed to make plain to them or to their employers that the picketing was not aimed at them, there is the circumstance that, if the Union were only interested in picketing the primary employer, Campbell's two plants afforded it an adequate opportunity for this purpose. In its prior opinion herein (J. A. 24a), this Court recognized that this factor, although not conclusive, is relevant in determining whether Section 8 (b) (4) (A) is violated. See also, *N. L. R. B. v. Truck Drivers & Helpers Local Union No. 728*, 228 F. 2d 791, 795 (C. A. 5).

Accordingly, the record fully supports the Board's conclusion that the Union's activity at the construc-

tions projects violated Section 8 (b) (4) (A) of the Act.

ARGUMENT

Substantial evidence on the record considered as a whole supports the Board's conclusion that the Union's activity at the construction projects violated Section 8 (b) (4) (A) of the Act

In relevant part, Section 8 (b) (4) (A) of the Act provides that it shall be an unfair labor practice for a union or its agents—

to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment * * * to perform any services, where an object thereof is: * * * forcing or requiring * * * any employer or other person to cease using * * * the products of any other producer, * * * or to cease doing business with any other person.

The Union's activity at the construction projects exhibits both the means and the objective proscribed by this Section. Thus, the picketing at the projects induced secondary employees to strike, for the record shows (pp. 4-5, *supra*) that employees of at least some of the neutral contractors refused to work for the duration of the picketing, specifically attributing their action to the presence of the pickets. Moreover, the fact that an object of this inducement of secondary employees was to force their employers to cease using Campbell's products is revealed by the circumstances, noted by the Board (pp. 5-6, *supra*), that the project was picketed only if the neutral contractor had first

refused the Union's request to refuse delivery of Campbell's concrete. In these circumstances, a violation of Section 8 (b) (4) (A) seems clear. See *Electrical Workers v. N. L. R. B.*, 341 U. S. 694; *N. L. R. B. v. Associated Musicians*, 226 F. 2d 900 (C. A. 2), certiorari denied, 351 U. S. 962; *Piezonki d/b/a Stover Steel Service v. N. L. R. B.*, 219 F. 2d 879 (C. A. 4); *N. L. R. B. v. Local Union No. 55*, 218 F 2d 226 (C. A. 10).

The Union's basic contention (Br. 9-26) is that this impact on neutral employers and their employees was privileged as an incident of its right, protected by Sections 7 and 13 of the Act, to picket in furtherance of its primary dispute with Campbell. That is, the Union asserts that, since Section 8 (b) (4) (A) would not interdict the picketing at Campbell's own plants even though an object thereof is to curtail Campbell's business,⁵ a distinction must be drawn between situations where the secondary impact of the picketing is merely incidental to the exercise of legitimate primary activity, and those where the implication of neutral employers is the direct goal. Pointing to the facts that Campbell's employees performed work on the construction projects, and that the Union picketed there only when these employees were present and otherwise adhered to the Board's *Moore Drydock*

⁵ See *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665; *DiGiorgio Fruit Corp. v. N. L. R. B.*, 89 U. S. App. D. C. 155, 191 F. 2d 642, 649 (C. A. D. C.), certiorari denied, 342 U. S. 869.

criteria,⁶ the Union concludes that the evidence did not warrant the Board in finding that the Union had an illegal "secondary" object, rather than a legitimate "primary" purpose.

We submit that the record amply supports the Board's conclusion that the Union had the illegal "secondary" object proscribed by Section 8 (b) (4) (A). Indeed, we believe that this Court's action, in pointing to the other evidence in the record not relied on by the Board originally, and in remanding the case to the Board for its further consideration (pp. 4-5, *supra*), contemplates that the Board could well reach such conclusion on the record here. Thus, as noted previously, the Union, before picketing the construction project, specifically requested the contractor not to accept delivery of Campbell's concrete. If he agreed, there was no picketing, but if he refused, the picketing ensued. This would seem to demonstrate that, in extending its picket line to the construction projects, the Union was aiming at the neutral em-

⁶ In *Moore Drydock Co.*, 92 N. L. R. B. 547, the Board enunciated certain evidentiary tests to aid in determining whether picketing at a site where both primary employees and those of neutral employers performed work would be regarded as primary and lawful or secondary and unlawful. For the picketing to qualify as primary, the Board indicated that all of the following conditions had to be satisfied (*Id.*, at 549):

(a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. * * *

ployer directly, and not merely implicating him as an incident of picketing the primary employer.⁷ Nor is this conclusion negated by the Union's suggestion (Br. 24) that it went to the neutral contractor out of "courtesy," or because of "a moral obligation," in an effort to enable him "to take steps to counteract whatever incidental effect consequent picketing may have had on his employees." The record shows only a flat request that the contractor stop using Campbell's concrete. If the Union had the motive which it suggests, it seems likely that it would at least have pointed out that its dispute was only with Campbell. And, where the contractor decided to continue using Campbell's concrete, it could be expected that the Union would have added that it did not intend, by the ensuing picketing, to pull his employees off the job—so that the contractor, in turn, could have communicated this to the employees. Not only did the Union fail to so assure the contractor, but, as the Board found (p. 6, *supra*), it made no effort, when his employees began to walk off, to inform them that the picketing was not intended as an appeal to them not to work.

⁷ Even though the Act does not proscribe union inducement of an *employer*, as distinguished from inducement of his employees (see Union Br. 23), it is well settled that threats to the employer may be used as evidence of the fact that the union possessed the illegal object defined in Section 8 (b) (4) (A). See *N. L. R. B. v. Denver Bldg. & Construction Trades Council*, 193 F. 2d 421, 423-424 (C. A. 10); *N. L. R. B. v. Local Union No. 55*, 218 F. 2d 226, 231 (C. A. 10); *N. L. R. B. v. Associated Musicians*, 226 F. 2d 900, 904 (C. A. 2), certiorari denied, 351 U. S. 962.

The situation here stands in sharp contrast to that in *N. L. R. B. v. General Drivers etc. Local 968*, 225 F. 2d 205 (C. A. 5), certiorari denied, 350 U. S. 914, cited by the Union (Br. 10-11). In holding that the picketing there was aimed only at the primary employer, Otis Massey, and thus lacked the proscribed secondary object, the Fifth Circuit noted that, unlike here, the Union took the following steps: It made plain in its conversations with the neutral employers that the dispute was only with Otis Massey and not with any other employer. Moreover, as soon as it saw that the picketing was nevertheless causing neutral employees to leave the job, it added the notation "See our pamphlet" to the picket signs and commenced distributing handbills to the employees, which expressly stated that its dispute was only with Otis Massey (225 F. 2d at 207-208, 211).⁸

In addition to the evidence showing the Union unequivocally demanded that the contractors discontinue using Campbell's products, and failed to make plain to them or to their employees that the picketing was not aimed at them, there is the circumstance that, if the Union were interested in picketing only the primary employer, Campbell's two plants afforded it an adequate opportunity for this purpose. Thus, Campbell's employees spent at least 25 percent of their

⁸ The Court in that case also regarded it as significant that the "complaint was brought at the instance of the primary employer and charging party Otis Massey, rather than on behalf of any adversely affected secondary, and neutral employers" (225 F. 2d at 211, fn. 14). Here, on the other hand, the charge was filed by the Associated General Contractors, the representative of the neutral contractors (J. A. 1a, 11a).

working time at its plants (J. A. 13a), which were picketed at all times relevant hereto. In its prior opinion herein, this Court recognized (J. A. 24a) that this factor, although not conclusive, is relevant in determining whether Section 8 (b) (4) (A) is violated. Accordingly, the Board properly regarded the fact that the Union could have effectively picketed Campbell at its own plants as a further indication that it intended to go beyond Campbell to the neutral contractors, by extending the picket line to the construction projects. As the Fifth Circuit observed in a similar situation: "Obviously, the establishment of a picket line at Ford's plant [the premises of the neutral employer] was plainly superfluous if intended only to publicize the dispute with National [the primary employer] among National's employees" *N. L. R. B. v. Truck Drivers & Helpers Local Union No. 728*, 228 F. 2d 791, 795).

The substantiality of the foregoing evidence as to the Union's illegal secondary object is not diminished by the further fact, emphasized by the Union (Br. 9-11), that its picketing at the construction projects may have complied with the *Moore Drydock* criteria for common situs picketing (see n. 6, *supra*). The Court in *General Drivers Local 968*, *supra* pointed out, in a passage approved by this Court in its prior opinion (J. A. 26a-27a), that the *Moore Drydock* criteria are only evidentiary guides, and that the controlling question in each case is whether, on the record presented, there is "substantial evidence that the unlawful objective denounced by the statute actually existed" (225 F. 2d at 209). That is, even though the

Moore Drydock criteria may be complied with, there may be other evidence which overrides the inference of primary purpose that otherwise follows from such compliance and, in the Board's view, this was true here.

CONCLUSION

For the foregoing reasons, it is respectfully requested that a decree should be entered enforcing the Board's order in full.

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APRIL 1957.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

* * * * *

SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or em-

ployer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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REPLY BRIEF FOR PETITIONER

IN THE

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA**

NO. 13,651

TRUCK DRIVERS AND HELPERS LOCAL UNION 728 (formerly Local Union 859) OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition to Review and Set Aside and on Petition
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United States Court of Appeals
For the
District of Columbia Circuit

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Joseph W. Stewart
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Respondent.

REPLY BRIEF FOR PETITIONER

The answering brief filed by respondent National Labor Relations Board herein well demonstrates the basic error in its approach to this and other cases involving the exercise of the right of peaceful picketing in the so-called common situs situation where violations of Section 8(b)(4)(A) of the National Labor Relations Act are alleged. That error lies in the refusal of the Board to recognize that, under Sections 7 and 13 of the Act, the right of peaceful picketing, regardless of where exercised, is given full protection, to be proscribed only where clearly and specifically directed by other sections of the Act, and, further, that the right of peaceful picketing finds even more fundamental protection under the federal Constitution and the First Amendment thereto as a concomitant of the exercise of the right of free speech. Under those circumstances it would seem the obvious function of the Board to lend support to those protections unless clear of circumstances, plus the specific

language of the Act, command otherwise. In any event, it surely is not for the Board to exert its every effort to find excuse for denial of that right even to the extent, as here, of utilizing a circumstance which it itself, in its original determination in this case, considered of no consequence.

Since in its recent decisions the Board has apparently lost all sight of the status of peaceful picketing under the federal Constitution, it may be well briefly to remind it of the following pronouncements of the United States Supreme Court on the subject:

In the United States freedom of expression is the rule, restraint the exception. Legislative or judicial action restraining freedom of speech can be defended only on the ground that an exception obtains in the given case. *Thomas v. Collins*, 323 U. S. 516, 529-30. Peaceful picketing has been uniformly held to be a constitutionally protected mode of communication since the decision of this Court in *Senn v. Tile Layers Union*, 301 U. S. 468, 478.

“[Doubts] and difficulties . . . arise frequently when this Court is obliged to give definiteness to ‘the vague contours’ of Due Process or, to change the figure, to spin judgment upon State action out of that gossamer concept.” *Haley v. Ohio*, 332 U. S. 596, 602 (Frankfurter, J., concurring). But “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule.” *Burstyn v. Wilson*, 343 U. S. 495, 503. “This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties—the phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of these rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.” *Schneider v. Irvington*, 308 U. S. 147, 161.

Solicitous concern for the liberties of speech and press has caused this Court to state that freedom of speech is in a "preferred position" (*Murdock v. Pennsylvania*, 319 U. S. 105, 115); its restraint is the "exception rather than the rule" (*Burstyn v. Wilson*, *supra*, at 503); it is to be "guarded with a jealous eye" (*A. F. L. v. Swing*, 312 U. S. 325); "mere legislative preferences" may not suffice when the First Amendment guarantees are involved (*American Communications Assn. v. Douds*, 339 U. S. 382, 401; *Thornhill v. Alabama*, 310 U. S. 88, 95-96); and that in "borderline instances" the doubt is to be resolved in favor of freedom of speech (*Pennekamp v. Florida*, 328 U. S. 331, 347).

The rule could hardly be otherwise. Unless the exercise of constitutionally-guaranteed rights and immunities is presumptively favored, one seeking to exercise those rights in face of a limiting statute would be forced to overcome a presumption in favor of the restraint. Thus, without a presumption in favor of freedom of speech, restraint would become the rule rather than the exception.

The fundamental importance of "[peaceful] picketing [which] is the workingman's means of communication" (*Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 293) to our industrial society cannot be doubted at this late date. Hence, restraints upon the "workingman's means of communication" should be the exception rather than the rule. Those who would sanction restraint have "a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case." *Burstyn v. Wilson*, *supra*, at 504. Nothing less than a "solidity of evidence should be required" if the Unions are to be deprived of the right to peaceful picketing. *Pennekamp v. Florida*, *supra*, at 347.

"The First Amendment draws no distinction between the various methods of communicating ideas." *Superior Films v. Dept. of Education*, 346 U. S. 587, 589 (Douglas, J., concurring). Speeches, door-to-door religious solicitations, religious solicitations in privately or governmentally owned

towns, union solicitations, pamphlets, a flag, motion pictures, and peaceful picketing, all serve as vehicles of communication. For this reason each is entitled to the Constitution's protection.

We are here concerned with peaceful picketing which has been uniformly recognized by this Court as a means of publicizing the facts of a labor dispute which is entitled to the First Amendment's protection. In *Carlson v. California*, 310 U. S. 106, 112-13, the United States Supreme Court said:

"The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern . . . [publicizing] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state."

Not only has the Board in this case ignored the strong presumption in favor of the legality of peaceful picketing, but it has, as indicated above, resorted to the use of evidence which it earlier deemed of no significance, namely, the fact that the respondent union had requested various of the neutral contractors of the construction jobs where Campbell was pouring concrete to give aid to this cause by not dealing with Campbell, and then picketed only when such aid was refused. Obviously, indeed necessarily, picketing at the construction sites would be carried on only when the neutral contractors did not give their support, because only in that event would Campbell appear at the construction site and engage in work.

Further, and even worse, the Board has resorted to coupling two separate activities of the union, each of them legal in itself, to produce an alleged illegal purpose. Since, as seen in our principal brief, picketing in compliance with the Moore Dry Dock's standard is proper under the Act, and

since direct appeal to employers is permitted under the Act, it is difficult to see how the combination of two legitimate activities can support a finding of unlawful objective. In another context, the Supreme Court of the United States has similarly condemned "the practice of imputing a sinister meaning to the exercise of a person's constitutional rights." *Slochower v. Board of Ed. of N. Y.*, 100 L. Ed. (Adv.) 449, 454. To paraphrase, the constitutional right to engage in peaceful picketing and the Congressionally-protected right to solicit the aid of neutral employers "would be reduced to a hollow mockery if [their] exercise could be taken as equivalent . . . to a confession of" an unlawful purpose.

In net result, it is clear that the Board here is attempting to accomplish indirectly that which it cannot accomplish directly under the decision of this Court in *Campbell Coal (Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, etc. v. National Labor Relations Board*, 97 U. S. App. D. C. 173, 229 F. 2d 514) and of the Fifth Circuit in *Otis-Massey (National Labor Relations Board v. Teamsters Local 968 (C. A. 5), 225 F. 2d 205)*. Indeed, in spite of the fact that the Supreme Court of the United States refused the Board's request to review both of those cases, the Board has nevertheless chosen completely to ignore them. For example, in the *Southwestern Motor Transport* case, 115 NLRB 981, which involved a common situs situation, the Board specifically refused to follow the decision of this Court in the *Campbell Coal Company* case. The Board there found that picketing at a common site violated Section 8(b)(4)(A), even though the union followed the standards laid down in the *Moore Dry Dock Co.* case, 92 NLRB 547, because an alternative noncommon site, the primary employer's place of business, was available. See also *W. H. Arthur Co.*, 115 NLRB 1137. *Local 117, United Glass & Ceramic Workers (Mason & Dixon Line, Inc.)*, 117 NLRB

No. 94, March 14, 1957, is the Board's most recent defiance of the *Campbell Coal* decision of this Court.

It is respectfully submitted that the Board's decision on reconsideration of this case is in error, that its conclusions are not supported by substantial evidence on the record as a whole, and that the Board's order deprives respondent and its members of rights protected both under the Act and under the First Amendment to the Constitution of the United States. The Board's order therefore should be reversed.

Respectfully submitted,

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*United States Court of Appeals
For the District of Columbia Circuit*

MARK 29 1957

Joseph W. Stewart

Statement of Questions Presented

1. Whether the Board properly concluded that in the circumstances of this case the union's picketing of a primary employer at various construction projects where such employer's employees were employed fifty per cent of their time, in addition to picketing at several plants of such employer, violated Section 8(b)(4)(A) of the National Labor Relations Act.

2. Whether there is substantial evidence on the record considered as a whole to support the Board's conclusion of a violation of Section 8(b)(4)(A).

3. Whether the Board's Order under the circumstances of this case deprives of rights protected by the First Amendment to the United States Constitution.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 13,651

TRUCK DRIVERS AND HELPERS LOCAL
UNION 728 (formerly Local Union 859) of IN-
TERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR PETITIONER

Jurisdictional Statement

This is a petition by Truck Drivers and Helpers Local Union 728 (formerly Local 859) of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (hereinafter sometimes called the "Petitioner" and sometimes called the "Union"), asking this Court to review and set aside the Supplemental Order (J.A. 32a) of the National Labor Relations Board (hereinafter sometimes called the "Board") issued against the Union on September 12, 1956, pursuant to Section 10(c) of the Labor-Management Relations Act (hereinafter sometimes referred to as the "Taft-Hartley Act"), as amended, 61 Stat. 136, 29 U.S.C. §151, et seq. In its Answer to the Petition, the Board has requested that its Order be enforced. The jurisdiction of this Court is based upon Section 10(f) of the Taft-Hartley Act. The Board's Supplemental Decision and Order are reported in 116 NLRB No. 124, and appear here at J.A. 28a.

STATEMENT OF THE CASE**I****The Proceedings Before the Board and
the Prior Proceedings in this Court**

The present case involves a proceeding to review a Supplemental Decision and Order of the National Labor Relations Board. The Board's initial Order in the present proceedings¹ was set aside by this Court in Case No. 12,605, 1955 Term, 229 F. 2d 514, 97 U.S. App. D.C. 173, cert. denied, 351 U.S. 972. This Court's opinion in that case is set forth at J.A. 18a. That opinion set aside the Board's Order and remanded "the case to the Board for its further consideration if desired" (J.A. 27a). In its Decision in the case this Court held that the Board had erred in restricting petitioner's picketing to the home place of business of the employer involved in the case and prohibiting petitioner from picketing such employer where it is engaged in work at other places of business, i.e., at construction jobs where other employees were also at work at a common situs of employment. This Court found that the Board erred in concluding, on the sole basis of the fact that petitioner could have effectively picketed the employer at a place other than at the common situs of employment, that an object of petitioner's picketing was to induce secondary strikes.

Subsequently, on September 12, 1956, the Board, on the basis of the same record that was before it in the original case, issued a Supplemental Decision and Order in which

¹ The original proceedings in the first review before this Court involved Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of the International Brotherhood of Teamsters. Subsequent to the decision of this Court in that case, that local union has been dissolved, and its jurisdiction and membership have been taken over by Truck Drivers and Helpers Local Union 728. By stipulation of the parties herein, the Board amended its Supplemental Decision by naming Local Union 728 in lieu of Local Union 859. (J.A. 38a).

it again found petitioner guilty of violating Section 8(b) (4)(A) of the Act and ordered it to cease and desist from the alleged illegal picketing at the common situs, and to take other affirmative action. The Board predicated its findings of an illegal object in its Supplemental Decision solely on evidence that petitioner had requested the general contractor or his representative at the common situs not to accept delivery of the product from the employer with whom petitioner was engaged in a labor dispute, and if such contractor refused such request, the precise picketing which this Court had found legal and proper in its decision in this case would then be commenced. The fact that such requests were made, and picketing was carried on only if the requests were refused, constituted conclusive proof, said the Board, that the purpose of the picketing was to cause strikes among employees of neutrals.

II

Statement of the Facts Involved

The facts upon which the Board based its conclusions in both its original and Supplemental Decision are confined entirely to a short stipulation (J.A. 11a) agreed to by the parties in the original proceedings before the Board. Since the major issue in this case is whether these facts are sufficient to support the Board's conclusions of a violation of Section 8(b)(4)(A), these facts will be discussed in more detail in connection with the argument on this point. Furthermore, such facts have been succinctly set forth by this Court in its first Decision in this case. Accordingly, for present purposes it is sufficient simply to summarize the facts as follows (See J.A. 12a-15a):

In June of 1954 the Union became involved in a labor dispute with the Campbell Coal Company (hereinafter sometimes referred to as "Campbell" or the "Employer") of Atlanta, Georgia. That company operates two ready-mix concrete plants in the Atlanta area. Following the discrimi-

natory discharge of nine of its members by Campbell, the Union engaged in a strike commencing June 9, 1954.² In connection with its ready-mix operations Campbell employs truck drivers who deliver the ready-mix to various construction sites in that area. These truck drivers enter and leave the two ready-mix plants several times in the course of each working day, although they spend only approximately 25% of their time at these two plants. Approximately 25% of the truck drivers' time is spent going to and from the plants and the construction sites. The balance of the working time of these truck drivers is spent at the construction sites. There Campbell's truck drivers, at the direction of the contractors on the job sites, operates the unloading mechanisms of the trucks so as to place and pour the ready-mix concrete as directed by the contractors. The ready-mix concrete becomes a part of the structures being built at the construction projects.

The Union picketed at both of the plants and also at seven construction sites where the ready-mix concrete was being delivered and poured. The picketing at the construction sites was peacefully conducted by pickets who carried signs which read:

"Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers & Building Construction Drivers, Local 859, AFL."

The pickets conducted their picketing only when the Campbell trucks were engaged in pouring concrete and picketed as closely as possible to the trucks. No oral or other inducement was made to any other employees at the construction site to refrain from working.

² The Court may judicially notice the Decision of the Board in the related case, based upon the Union's charges that nine of its members were discriminatorily discharged by Campbell. The Board found that eight out of nine of the discharges were discriminatory. *Campbell Coal Co.*, 112 NLRB No. 119, decided May 26, 1955.

It was further stipulated that at each construction site the Union agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused, the Union took no further action, but if accepted the Union agents picketed the immediate area of the trucks with the signs already described.

In its first Decision the Board did not rely on the above portion of the stipulation. This Court directed a remand so that the Board, if it desired, could consider all portions of the stipulation. In its Supplemental Decision the Board, relying solely on the foregoing additional evidence, concluded there was sufficient in the record to warrant a finding that it was an object of the picketing to induce the employees of the contractors or subcontractors at the construction site to cease employment for the purpose of forcing those contractors to cease using Campbell's ready-mix concrete.

III

The Board's Order

The Board's Order requires the Union to cease and desist from inducing or encouraging employees of the seven named construction companies or of any other employer to engage in a strike or concerted refusal, in the course of their employment, to perform services for their employers where an object thereof is to force or require said employers to cease doing business with Campbell; and to post the customary notices of compliance with the Board's Order (J. A. 32a).

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. § 151, *et seq.*), are §§ 7, 8(b)(4)(A), and 13:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 8 . . . (b). It shall be an unfair labor practice for a labor organization or its agents— . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . ."

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT OF POINTS

1. The Board erred in concluding that petitioner's picketing was for an unlawful purpose, and, in support thereof, in relying upon the literal language of Section 8(b)(4)(A) and on bare inference and speculation without regard to the paramount right of labor organizations to engage in primary picketing for lawful purposes.

2. There is no substantial evidence on the record as a whole to support the Board's conclusion that petitioner was picketing for an object proscribed by Section 8(b)(4)(A) of the Act; since the Board could under the evidence have as easily inferred a proper motive as an improper one, substantial evidence has not proved petitioner to be guilty of an unfair labor practice.

3. The Board's Order deprives petitioner and its members of fundamental rights protected under the Act and under the First Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

The picketing herein which the Board has found to be in violation of Section 8(b)(4)(A) was in fact conducted by the Union in full compliance with the rules for common situs picketing laid down by the Board in its *Moore Dry Dock* decision (92 NLRB 547) and as approved by this Court in its first decision in this case. Thus, the picketing was engaged in pursuant to a lawful primary labor dispute between the Union and Campbell, i.e., the discriminatory discharge by Campbell of nine of the union members; the picketing, both by reason of the inscription on the picket signs and the manner in which it was conducted, disclosed clearly that the dispute was with Campbell alone; the picketing was limited to times when Campbell was on the neutral employers' premises where Campbell was engaged in its normal business operations, Campbell's employees being employed at the construction sites in pouring concrete 50% of their time as compared to 25% of their time at the plant sites and 25% of their time on the road hauling the ready-mix concrete; and finally, the picketing was confined as closely to Campbell's ready-mix trucks from which the concrete was being poured at the construction jobs as was physically possible.

This Court, in its first decision in this case, has already declared that the fact that the picketing could be and was

effectively carried on at Campbell's two plants did not permit the Board, by rigid rule, to declare that accordingly the picketing could be carried on at no other place, or to conclude that because picketing was also carried on at the construction sites it must have been with an object of inducing strikes among the employees of neutrals at such common sites of employment. This court so held because of the paramount protections afforded the right of peaceful picketing not only in the Act itself (Sections 7 and 13) but under the First Amendment to the federal Constitution. To rely, as the Board now does in its Supplemental Decision, on the fact that the Union advised the neutral building contractors on the construction sites of its dispute with Campbell, and asked their cooperation and assistance in refusing to accept Campbell's concrete, as conclusive evidence that the picketing at the construction sites was for an improper purpose is erroneous for the following reasons:

First, labor organizations have a clear right, upheld by the Board and the courts, to request such cooperation from neutrals in the course of labor disputes; indeed, it may well be a moral obligation or at least an act of courtesy for a union to advise neutrals of proposed picketing so that safe-guards may be taken, it being fully accepted by the Board and the courts that legitimate primary picketing may have incidental effects upon employees of neutrals which are not proscribed by the Act. The fact that picketing was carried on at the construction sites only if cooperation and assistance by neutrals was refused proves nothing; obviously, Campbell could not be picketed at a place where he did not appear and engage in cement-pouring operations because of the neutrals' voluntary refusal to accept the cement.

Second, under all of the evidence in this case, including the nature of the dispute and the manner in which the picketing was conducted, the Board could much more read-

ily have inferred a proper object or motive than an improper one; "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice." (*Houston Chronicle Publishing Co.*, 211 F. 2d 848, (C.A. 5, 1954.) The right of peaceful picketing being one not only protected by the Act but by the federal Constitution, it is the function of the Board to seek to protect that right rather than, as it has done here, strain to defeat it. It is the Board's burden to prove an improper motive or object in the picketing and not petitioner's to disprove it. The Board has not only failed to meet its burden, but, in holding petitioner guilty of unfair practices, has deprived petitioner of important statutory and constitutional rights.

ARGUMENT

I. The picketing herein was conducted in compliance with the Moore Dry Dock rules of common situs picketing.

In cases preceding the present one, and particularly in what has come to be its leading decision in respect to the application of the prohibitions of Section 8(b)(4)(A) to picketing conducted at a common situs of employment—*In the Matter of Moore Dry Dock Co.*, 92 NLRB 547—the National Labor Relations Board has laid down certain rules governing common situs picket line activity, and these rules have found approval in the various Circuit Courts of Appeal. This Court in its previous decision in this case (J.A. 21a) has summarized these rules as follows: The picketing must disclose clearly that the dispute is with the primary employer only; the picketing must be limited to times when the dispute situs is on the neutral employer's premises; the primary employer must be engaged in its normal business at the common situs when the picketing

takes place, and the picketing must be confined to areas reasonably close to the situs of the dispute. All these requirements the Union herein has admittedly complied with.

However, in its original Decision in the present case, the Board attempted to add an additional and absolute prerequisite to application of the *Moore Dry Dock* doctrine, namely, that no situs for effective picketing other than the common one be available. This Court reversed that holding because, it said, the Board thereby "has applied a rigid rule that when another separate situs is available picketing at a common situs is prohibited" (J.A. 22a). This Court concluded that no such "rigid rule . . . is contained in or deducible from the statute" (J.A. 25a). It is improper under the Act, said this Court, for the Board to attempt to utilize such a mechanical formula as evidence of the unlawful objective proscribed by Section 8(b)(4)(A), instead of relying upon substantial evidence in the record as a whole that a unlawful object did in fact exist. Quoting from a then recent decision of the Fifth Circuit in *N.L.R.B. v. General Drivers, Warehousemen & Helpers, Local 968*, 225 F. 2d 205, at 209, this Court (J.A. 26a) held that both the *Moore Dry Dock* decision and other decisions of the Board involving 8(b)(4) violations, and which had been upheld in the various Circuit Courts of Appeal, were

"* * * necessarily based upon substantial evidence that the unlawful objective denounced by the statute actually existed, rather than upon the inferentially suggested theory that this ultimate and controlling statutory inquiry may be effectually supplanted merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' publicized with impunity under the Act, and thereby inferring from such findings, as here, that the unlawful objective exists. Indeed, such a theory would, we think, elevate the Board formulated 'criteria' by judicial fiat to a vantage point from which it could, in effect, circumvent the statute, for in this

type instance it would substitute Board inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements that it is "*the objective of the union's secondary activities * * * and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision.*" (Emphasis supplied.)

This Court concluded its discussion by stating that "A violation of section 8(b)(4)(A) is not to be found by a rule of decision based upon findings which are inadequate to support the conclusion reached" (J.A. 27a).

II. The protections afforded peaceful picketing under the Act.

The foregoing conclusions were reached primarily on the premise that Section 7 of the Act, and particularly Section 13 thereof, specifically sought to preserve and protect the fundamental right of a labor organization to strike and picket a primary employer with whom the union was engaged in a legitimate primary labor dispute. Section 7 of the Act states, without qualification, that "employees shall have the right to . . . engage in concerted activities for the purpose of . . . mutual aid or protection". Section 13 is even more explicit in stating that "Nothing in this Act, *except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right". (Emphasis supplied.) The underscored language makes explicit the need for specific statutory language as a basis for outlawing particular types of picketing or striking.

The Supreme Court, in the *Rice Milling* case (*N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665) had this to say about the intent of Congress to interfere with the ordinary strike or picketing:³

"That Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike has been indicated recently by this Court. This is emphasized in § 13 as follows:

"'Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.'" 61 Stat. 151, 29 U.S.C. (Supp. III) § 163.

"By 13, Congress has made it clear that § 8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act. No such specific provision in § 8(b)(4) reaches the incident here. The material legislative history supports this view."

This Court, in its first decision in this case, had the following to say of the effect of Section 13 (J.A. 25a):

"To read it[a rigid rule of no common situs picketing where another situs is available] into the statute by implication would unduly invade the application of Section 13 which preserves the right to strike 'except as specifically provided' in other provisions of the Act. It is not specifically provided that picketing at a common site, with an incidental effect upon employees of

³ Although the reference in the decision is to "the ordinary strike", the Supreme Court obviously equated ordinary picketing with the ordinary strike, because, in *Rice Milling*, none of the employees of the employer against whom the picketing was directed engaged in the strike or in the picketing and, indeed, none were members of or sympathetic to the Union. The "strike" actually was picketing for recognition and consisted solely of picketing by members of the Union who were not employees of the struck employer.

a neutral employer, is unlawful in every case where picketing could also be conducted against the primary employer at another of its places of business."

What emerges from the foregoing discussion as highly significant in respect to the present case is this: First, Congress, in enacting Taft-Hartley, was concerned affirmatively with protecting the right to strike and picket, and desired to continue all of the guarantees of the right of employees to exercise those rights that were contained in the original Wagner Act. Second, Congress intended to permit the Board to limit that right only to the limited extent and in the limited manner specifically spelled out in particular language contained in the Act, namely, in Section 8(b)(4)(A) thereof. Under that section picketing can be proscribed only to the extent that it can be shown by substantial evidence in the record as a whole that an actual object of the picketing was to induce employees of neutrals to strike.

III. It is the function of the Board to seek to protect, not strain to deny, the right of peaceful picketing.

Let us elaborate on the foregoing principles as applied to the present case. First, in respect to the protections accorded the right to picket and the Board's corresponding duty to preserve that right unless clearly indicated to the contrary, not only is the right of picketing given strong and affirmative protection under the Act itself, but also that right, when peacefully exercised pursuant to a legitimate objective, finds additional and even more fundamental protection under the First Amendment to the Constitution of the United States as a concomitant of the exercise of free speech and assemblage.⁴ Picketing is unlawful only when intimately attached to or an integral part of unlawful ac-

⁴ *Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S. 106; *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722; *Bakery Drivers Local v. Wohl*, 315 U.S. 769; *AFL v. Swing*, 312 U.S. 321.

tivity, and the attachment to substantive evil must be direct and clear.⁵

Since the right of employees peacefully to picket is accorded full protection by Congress under the Taft-Hartley Act and in the federal Constitution, it would appear to be the duty of the Board to seek, wherever possible, to permit exercise of that right rather than, as here, to strain to find reasons why peaceful exercise of the right should be proscribed. The Board itself, in an earlier case (*Schultz Refrigerated Service, Inc.*, 87 NLRB 502), has pointed up the dangers of attempting to apply the literal proscriptions of Section 8(b) (4) (A) of the Act "without regard to the legislative history or the paramount right of a labor organization to engage in a primary strike for lawful purposes". Accordingly, doubts concerning the nature or object of the picketing should be resolved in favor of freedom to exercise that right. Yet the Board here, unlike predecessor Boards, has taken exactly the opposite position, and has sought to proscribe the exercise of the right, first, in its original decision, by application of a rigid mechanistic formula predicated on the place or situs where the picketing may take place, and now, in its present decision, as will be discussed more fully later, by use of an inference derived solely from the exercise of what is not only a right but may well be a moral obligation of a union engaging in picketing at a common situs, namely, informing the neutral employers at the common job site of the proposed picketing, and asking for their voluntary cooperation.

⁵ See, for example: *Building Service Employees Union v. Gazam*, 339 U.S. 532 (picketing for the purpose of coercing an employer to violate the state statute by coercing his employees to join the union); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (picketing to force owners of business to join union contrary to public policy); *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (picketing as an integral part of a program to violate the state anti-trust laws).

Not only is it the duty of the Board to strive to protect rather than strain to destroy the right of peaceful picketing, but the Board, as we have seen, also lacks authority to proscribe picketing at all except to the narrow extent and in the narrow manner set forth in the Act. But here again we find that the Board has overreached itself. As indicated above, the Act's only limitation on the right of picketing relevant to the present case is set forth in Section 8(b)(4)(A) which prohibits picketing of third party neutrals (here the contractors or subcontractors at the construction sites) with an object of forcing those neutrals, through a strike of their employees, to cease doing business with another employer (here, the Campbell Coal Co.). Whether that object exists is a question of fact to be determined by the Board on substantial evidence. Any inferences to be drawn must, as we have seen, be drawn in the light of the paramount protection accorded the right of peaceful picketing generally. Section 8(b)(4)(A) does not make striking or picketing illegal merely because one of their concomitants or consequences is to terminate business relations between parties to a labor dispute and their customers, or even between two neutral parties, nor does it do so because an incidental, even a necessary, effect of the picketing is to induce strikes by employees of neutrals. The Board, as well as the courts, has directly repudiated the incidental-effect-of-picketing argument on the ground that under it all primary concerted activities could immediately be outlawed just as it could under the everybody-knows-the-effect-of-picketing argument which the Board seems here to be advancing. To quote from two of the leading Board and two of the leading court decisions on the subject:

Pure Oil Co., 84 NLRB 315:

"The fact that the union's primary pressure on [the primary employer] may have also had a secondary effect, namely, inducing and encouraging employees of other employers to cease doing business on [the

primary employer's] premises, does not, in our opinion, convert lawful primary action into [un]lawful secondary action within the meaning of Section 8(b)(4)(A). To hold otherwise might well outlaw virtually every effective strike, for a consequence of all strikes is some interference with business relationships between the struck employer and others."

Ryan Construction Co., 85 NLRB 317:

"... when the picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons."

N.L.R.B. v. Service Trade Chauffeurs, Inc., 191 F. 2d 65 (C.A. 2, 1954):

"If this picketing met the criteria announced in the *Sailor's Union* case, then it was not unlawful because employees of the secondary employers, or employees of other employers, due to their habitual unwillingness to cross picket lines, refused to do so, for such effects are within the realm of the 'incidental'."

N.L.R.B. v. Local Union 55, 218 F. 2d 226 (C.A. 10, 1954):

"Mere incidental effect on the secondary employer is not enough to constitute a secondary boycott. Where there is no geographic separation between the work situs of the primary employer and the work situs of a neutral employer, that is, where the primary and secondary employers occupy a common work site, it is not easy to draw the line between permissible primary action and proscribed secondary action."

This Court, in its first opinion in this very case, has itself repudiated the incidental-effect argument, stating (J.A. 25a) that nowhere in the Act is it "specifically provided that picketing at a common site, with an incidental effect upon employees of a neutral employer, is unlawful

in every case where picketing could also be conducted against the primary employer at another of its places of business". Later in that same opinion (J.A. 27a) this Court concluded to set aside the Board's Order "notwithstanding the picketing had incidental effect upon employees of neutral employers".

Even more recently it has been held by the Second Circuit in *Douds v. International Longshoremen's Association*, 224 F. 2d 455, cert. denied 76 S. Ct. 117, that an illegal objective cannot be inferred simply because it is one of the consequences of a course of action taken pursuant to a principal and valid object. Judge Learned Hand, speaking for Court in that case, amplified on this important distinction as follows (224 F. 2d at 459):

"It is indeed true that this [cessation of business between trucking concerns and their customers, who were neutrals in the labor dispute] was one of the probable, nay perhaps, inevitable, consequences of the refusal [of the Union's members to serve the trucks]; but the liability imposed by the section is much more limited than the usual liability for a tort, which extends to any damage that the tortfeasor should reasonably have expected to result from his act. All strikes and 'concerted refusals' to work involve some cessation of business; that is the only sanction they can have. When Congress limited the wrong to occasions when the cessation was an 'object' of the conduct, it excluded much indeed that the ordinary law of tort would have included. If it had not done so, it would have made nearly all strikes unlawful. The 'object' of an action is the concluding state of things that the actor seeks to bring about; that which satisfies his aim. Hence it is a term relative to the whole sequence of steps that he proposes; and it does not apply to those that are only intermediate to it. If I wish to enter my house, but can do so only by passing through my garden, my 'object' is to enter the house, and it is not a subsidiary 'object' to pass through the garden. On the other hand, if I find the garden gate locked, and I take out my key, the 'object' of my doing so is to open the gate, though it is still only a

step towards entering the house. So in the case at bar, if the respondents' refusal to serve the trucks was merely to cause a cessation of business between the 'Association' and the trucking companies or between those companies and their customers, that may have been within the section, though not even that is perfectly certain as will appear. On the other hand, if the refusal was a part of the struggle for control of the Port, that was the only 'object' in the sense that that term is used in the section, unless it is to cover all acts in a labor dispute that are known and intended to result in a cessation of business between others."

IV. Where, as here, the Board under the evidence could as well have inferred a proper motive as an improper one, it has not met its burden of proving an unlawful object.

Finally, before examining the evidence in this case to determine whether the union's object was unlawful, so that it could be found guilty of violating the Act, it must be remembered that "The burden 'was upon the Board to prove its charges by competent and credible evidence and not upon the Respondent to disprove them.' *National Labor Relations Board v. Ray Smith Transport Co.*, 5 Cir. 193 F. 2d 142, 144." (Quoted in *N.L.R.B. v. Reynolds & Manley Lumber Co.*, 212 F. 2d 155, 158 (C.A. 5, 1954). See also Administrative Procedure Act, 5 U.S.C.A. §1001 *et seq.*, and *Sales Drivers, Helpers and Building Construction Drivers Local Union 859, etc. v. N.L.R.B.*, 97 U.S. App. D.C. 173, 229 F. 2d 514.

To this should be added the important admonition of the Fifth Circuit in *Houston Chronicle Publishing Co.*, 211 F. 2d 848:

"When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice." (Emphasis supplied.)

V. The evidence in this case does not justify an inference of an improper motive or object in the picketing.

Bearing in mind the foregoing principles, let us examine the evidence in this case on the basis of which the Board has concluded that a direct object of the union's otherwise valid picketing of Campbell's operations at the construction sites (as distinguished from an incidental consequence or even necessary effect thereof) was to cause strikes among the employees of the neutrals who were also employed at the construction sites where the picketing was carried on. Does this evidence as a whole indicate such direct object, or is such evidence as consistent or more consistent with a proper and legitimate motive? It must be remembered that this Court has already concluded that the picketing at the construction sites cannot be considered improper merely because picketing could be effectively carried on at the two plants of Campbell rather than at the construction sites, so that there was no need to picket at the construction sites where the picketing would have a necessary effect of involving neutrals. The evidence in this case discloses the following circumstances:

1. The picketing was carried on against a primary employer, the Campbell Coal Co., pursuant to a legitimate primary labor dispute, i.e., to protest discharges of union members which the Board in another case found were discriminatory.

2. The picketing, at all times peaceful, was conducted at a situs which harbored the primary labor dispute, that is, it was carried on where Campbell Coal conducted a substantial part of its operations, namely, the unloading and pouring of ready-mix cement, under the direction of the construction foreman, into forms provided by contractors at the construction site as an actual part of the construction process. The employees of Campbell spent a substan-

tial, indeed a major, portion of their time at the construction site—50% there as compared with 25% at the plants and 25% on the road. Thus, the presence of Campbell's employees at the construction sites cannot be considered transitory or peripheral.

7. 3. The picket signs were so worded as to properly indicate to the public, to Campbell's employees, and to any other persons who might read them that the dispute was with Campbell Coal alone. There was no attempt by any of the pickets to communicate with any of the employees working at the construction projects in any way whatsoever. The picketing was confined to the immediate area of Campbell's trucks or as close thereto as the pickets could get without trespassing on private property, and the picketing continued only so long as Campbell's employees remained at the construction sites. Certainly, the withdrawal of the pickets in each instance when Campbell's truck drivers drove away with their empty ready-mix trucks from the construction site was a further plain indication to all on the construction sites that the Union's dispute was solely with Campbell.

4. In addition to the absence of any evidence that pickets or any other representatives of the Union attempted orally to induce or encourage any construction workers at the various construction sites to quit work, the record is entirely devoid of any evidence that the Union attempted to induce joint or cooperative action of affiliated construction unions, either through contact with the Atlanta Building Trades Council or directly with other craft locals, for the purpose of securing their assistance in the dispute with Campbell. Finally, there is no showing of any sister union connivance by way of union rules or by-laws as contained in the constitutions or rules of either the Building Trades unions or the other affiliated crafts whose members were

working at the construction sites.⁶ All that the record shows in respect to any inducement to employees of neutrals to engage in strike action is the mere display of the picket signs. Ineed, there was not even a claim by the Board of any unlawful inducement other than by the display of picket signs. This is made clear by the Stipulation herein which very specifically states:

“Except by the display of picket signs, as herein described, the General Counsel does not contend that the Respondent, through its pickets, officers, or otherwise, in any manner threatened, coerced or intimidated employees to quit work, or that any other form of inducement or encouragement of employees, whether by way of union by-laws or rules (written or unwritten), threats, promises, or otherwise, existed.” (J. A. 14a.)

5. The Stipulation does disclose (J.A. 14a) that the Union's pickets did not inform the employees who quit work or other employees working on the picketed projects that such picketing was not intended as an appeal to them not to work, nor otherwise inform such employees that they were free to resume work while the picketing was in progress. However, up to the present time at least, it has never been held that the Act imposes an affirmative duty on unions to request other union members to ignore their picket lines—a requirement that would be entirely inconsistent with the entire concept of peaceful picketing as traditionally conceived in the American labor movement, and the Board has had occasion to specifically hold that the duty of picketing unions to take precautions against

⁶ Factors such as the foregoing have customarily been utilized by the Board as proof of an unlawful object. See, for instance, *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675; *Brotherhood of Painters, Decorators and Paperhangers of America, Local Union No. 1730, and Painting and Decorating Contractors of America*, 109 N.L.R.B. No. 166; *N.L.R.B. v. Chauffeurs Local 135*, 212 F. 2d 216 (C.A. 7, 1954); *N.L.R.B. v. Carpenters Local 55*, 218 F. 2d 226 (C.A. 10, 1954); *Piezonki d/b/a Stover Steel Service v. N.L.R.B.*, 35 LRRM 2545 (C.A. 4, 1955).

unnecessary involvement of neutrals, as, for instance, by the use of properly-directed picket signs, does not require that the pickets inform neutral employees that the picketing was not intended as an appeal to them. *Pittsburgh Plate Glass Co.*, 110 NLRB No. 84. In the Matter of Crump, Inc., 112 NLRB 311. Cf. the recent decision of the Seventh Circuit in *N.L.R.B. v. Teamsters Local 627*, 39 LRRM 2496.

6. Finally, the Stipulation indicates (J.A. 13a) that

“At the construction project the Respondent’s picket would advise the contractor, or its representative, of the labor dispute with Campbell, and ask the contractor or his representative not to accept the ready-mix from Campbell.”

In those instances where the building contractor agreed to assist the Union in its strike by refusing to accept Campbell’s ready-mix concrete, no picketing would be carried on at the construction sites; thus picketing at the construction sites would be carried on only if Campbell’s ready-mix deliveries were accepted. The Board makes much of this as conclusive evidence of an object to involve neutrals. However, on examination this fact proves nothing, for obviously the picketing could not be carried on at the construction sites in those instances where the contractors cooperated with the Union by refusing to accept Campbell ready-mix cement for the simple and necessary reason that there would then be no Campbell operation which could be picketed. In those other cases where the contractor would not agree to cooperate with or assist the Union in its strike, and Campbell’s employees did deliver the concrete and participate in the construction process, picketing of Campbell was carried on during the time the Campbell operations continued.

It is on this later piece of evidence alone, considered inconsequential in its first decision, that the Board now turns for proof of its present conclusion that the Union’s

purpose in picketing was to induce work stoppages among the employees of the neutral contractors employed at the construction sites. The mere act of requesting cooperation from other employers is utilized to make unlawful what otherwise has been held by this Court to be perfectly proper—indeed, what constitutes the exercise of both a statutory and constitutional right. Is the Board justified in so doing? We respectfully submit that it is not—that, under all of the circumstances in this case, it is clear that the Union was merely exercising one of its most important rights, with the object of reaching Campbell and his strike-breaking employees at places where those employees spend the major portion of their working time.

In considering what effect must be given the action of the Union in seeking the cooperation of the various building contractors in its dispute with Campbell, it must first be remembered that, in so doing, the Union was doing that which the Act permits and which, indeed, was its right. The Board has repeatedly held in other cases that unions are free to seek to induce neutral employers, by any and all means, even including threat of strike action, to aid a union cause by refusing to handle or process the goods of another employer engaged in a labor dispute or by ceasing to do business with such other employer, and this reading of the Act has been universally upheld by the courts. *Sealright Pacific, Ltd.*, 82 NLRB 271; *Lewis Karlton d/b/a Consolidated Frame Company*, 91 NLRB 1295; *Local Union 878, International Brotherhood of Teamsters, etc. (Arkansas Express, Inc.)*, 92 NLRB 255; *Schatte v. International Alliance*, 182 F. 2d 158 (C.A. 9), cert. denied 340 U.S. 827; *Rabouin v. N.L.R.B.*, 195 F. 2d 906; *N.L.R.B. v. Electrical Workers, CIO*, 228 F. 2d 553 (C.A. 2), decided December 22, 1955.

The Board itself, in its brief before the Second Circuit in the *Rabouin* case, *supra*, summarized some of the considerations which may motivate an employer, with or with-

out the Union's request, to extend cooperation to a union engaged in a strike (p. 40): "He may desire to aid the union lest substandard employment terms at the struck plant introduce undesirable competitive practices resulting from lower labor costs; the union may grant him a concession on other issues in exchange for his assistance; he may feel that preservation of harmonious relations with the union is preferable to doing business with the struck employer; or he may be convinced of the rightness of the union's cause."

Furthermore, since "A consequence of all strikes is some interference with business relationships between the struck employer and others" (*Pure Oil Co.*, 84 NLRB 315), it may very well constitute a moral obligation, or at least an act of courtesy, for a union to advise neutral employers engaged in work at a common site of employment that a labor dispute exists between the union and another employer at the job site so that the neutral employer can take steps to counteract whatever incidental effect consequent picketing may have on his employees. In any event, it would seem anomalous for the Board to attempt to shut off such consideration by declaring that any attempt to seek the cooperation of neutrals is conclusive proof of the unlawfulness of common situs picketing, at least in a situation where, as here, this is the only incident in the record to which the Board can point to show an unlawful object, it being clear that absent the conduct in question, the picketing under all of the circumstances would have been perfectly proper.

While it is true that the Second Circuit in *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, did hold that "requests and threats addressed by respondents to employers, even though not illegal in themselves, may be considered in determining the motives for picketing", it is submitted, first, that if that holding is taken to mean that such evidence standing alone would be sufficient, it is in error, and

second, that in that case the Board and the Court relied on a great deal more than the simple fact that requests had been made to employers. Thus, the Court there found that the places which were unlawfully picketed did not harbor the labor dispute:

"In our case the picketing does not come within the approved area of exception defined by the Moore Dry Dock criteria because neither the Stadium nor the Rink was at any time the situs of the dispute between the union and Gotham. The musicians worked at the studio, which could be readily, and in fact was, picketed. The musicians never worked at either of the secondary locations, and there was no connection between the musicians and broadcasts made from the Stadium or the Rink.

In the present case, the evidence taken as a whole indicates but one primary object, namely, to reach Campbell wherever Campbell's employees are employed in a substantial manner. Campbell was picketed peacefully at precisely those places of employment where it would be most natural and reasonable to picket, namely, where Campbell's employees were employed 50% of the time and at a place where Campbell was working other than transitorily, indeed where Campbell was contributing to the actual process of construction as much as other of the building crafts engaged in work at the building projects. Furthermore, the language of the picket signs and the manner in which the picketing was conducted disclosed clearly that the dispute was with Campbell alone and not with any of the neutrals. Surely, under all of the evidence, the Board, if it is to indulge in inferences, could much more easily and much more logically have inferred a proper, rather than an unlawful, motive. It is submitted that under the ruling of the Fifth Circuit in the *Houston Chronicle Publishing Co.* case, *supra*, "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor prac-

tice," and that accordingly the Board's conclusion of an 8(b)(4)(A) violation is not supported by substantial evidence on the record as a whole and should be reversed. It is clear that the Board has erroneously relied both on the literal language of Section 8(b)(4)(A) and on speculation and bare inference without regard to the paramount right of labor organizations to engage in primary picketing for lawful purposes, and has thus deprived petitioner's members of rights protected not only in the Act but under the federal Constitution.

CONCLUSION

For the reasons stated it is respectfully submitted that the Order of the Board herein be set aside and that the Board's petition for enforcement of its Order be denied.

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